

In the Court of Appeal of Alberta

Citation: Alberta Securities Commission v Felgate, 2022 ABCA 107

Date: 20220323
Docket: 2001-0199AC
Registry: Calgary

Between:

Alberta Securities Commission

Respondent

- and -

Nicholas John Felgate

Appellant

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Ritu Khullar
The Honourable Justice Jolaine Antonio

Memorandum of Judgment of Justice Slatter and Justice Khullar
Concurring Memorandum of Judgment of Justice Antonio

Appeal from the Decision by
Alberta Securities Commission
Dated the 6th day of October 2020
(Re Felgate, 2020 ABASC 156)

**Memorandum of Judgment
of Justice Slatter and Justice Khullar**

[1] The appellant appeals his conviction for trading in securities in breach of a cease trade order. He does not dispute that he engaged in the underlying conduct, but he argues that the cease trade order was void and he was entitled to ignore it.

[2] The Alberta Securities Commission received information that caused it to believe that the appellant was raising money from the public in breach of the provisions of the *Securities Act*, RSA c. S-4. The Commission issued an *ex parte* interim cease trade order under s. 33(1) of the *Act*.

[3] *Ex parte* interim cease trade orders are in effect for 15 days, but they can be extended following a hearing:

33(4) Before the expiry of an interim order, the Commission or the Executive Director, as the case may be, may extend an interim order for a specified period of time, or until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded, if

(a) the Commission or the Executive Director provides the person or company named in that order with an opportunity to be heard, and

(b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest.

The Commission extended the order once to a specified date. It was extended a second time and the appellant was subsequently charged with breaching the second extension order.

[4] The key terms of the second extension order issued after the hearing were:

6. The Commission, considering that length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest, orders under section 33(4) of the *Act* that the Interim Order is extended until any proceeding initiated pursuant to the Act, including a trial in respect of an offence, is finally determined or otherwise concluded.

At the time that this order was made, no proceedings had actually been initiated. The appellant argues that the Commission can only make an interim cease trade order that expires at the “conclusion of proceedings” after proceedings have actually been commenced. He does not dispute

that the Commission can issue cease trade orders prior to proceedings being initiated, but such orders must be for a “specified period of time”.

[5] This issue is a pure question of statutory interpretation. The provision should be interpreted by discerning the legislative intent from examining the statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statutory scheme and objects. On a proper interpretation, s. 33(4) empowers the Commission to issue interim cease trade orders in the two situations that might exist:

- (a) where proceedings have been initiated, the cease trade order could be in place for a specified period of time, or until the proceedings are concluded, or
- (b) where proceedings have not been initiated, the cease trade order can be in place for a specified period of time.

This interpretation is consistent with the scheme of the statute. As the appellant points out, when proceedings have not been initiated, an order in force until those nonexistent proceedings have concluded could potentially be in effect in perpetuity. The statute is widely worded to empower the Commission, but it is not intended that the statutory wording would simply be tracked in specific orders.

[6] The appellant is accordingly correct in arguing that the order as issued was flawed. It was not appropriate for the Commission to simply track the empowering wording of the statute in the order. The appellant, however, had three remedies:

- (a) He could have (but did not) make submissions about the proper form of the order at the hearing;
- (b) He could have appealed the order to the Court of Appeal under s. 38; or
- (c) He could at any time have applied it to vary or terminate the order under s. 214.

What the appellant was not entitled to do was to simply ignore the order and trade in securities as he wished: *R. v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706; *R. v Al Klippert Ltd*, [1998] 1 SCR 737.

[7] Whether a collateral attack of an order is possible must be determined by reviewing the legislature’s intention as to the appropriate forum for challenging the order. The relevant factors are: the wording of the statute under which the order was issued; the purpose of the legislation; the existence of a right of appeal; the kind of collateral attack in light of the expertise or *raison d’être* of the administrative appeal tribunal, and the penalty on a conviction for failing to comply with the order: *Al Klippert* at para. 13. The *Securities Act* is a statute designed to protect the public from economic losses through inappropriate financial market activities. The *Act* provides numerous effective remedies to someone who is subject to a cease trade order. The Legislature could not have intended that someone subject to a flawed cease trade order could simply continue to raise funds from the public without taking any steps to amend or terminate the order.

[8] The appellant relies on *Carey v Laiken*, 2015 SCC 17 at para. 33, [2015] 2 SCR 79:

33 The first element is that the order alleged to have been breached “must state clearly and unequivocally what should and should not be done”: . . . This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: . . . An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: . . . (Authorities omitted, emphasis added)

The appellant relies on the word “when” in this passage. In this case, however, there was never any doubt that the cease trade order purported to be in effect at the time the appellant traded in securities. There was no ambiguity in the order that provides a defence to him.

[9] The appellant argues that “collateral attack” is a new issue on appeal, but on this record it was always at the forefront. In any event the record is clear, and the appellant conceded that he would suffer no prejudice by its consideration on appeal.

[10] In summary, the order as drafted was flawed, but the appellant was not entitled to simply ignore it. The appeal is dismissed.

Appeal heard on March 11, 2022

Memorandum filed at Calgary, Alberta

this 23rd day of March 2022

Slatter J.A.

Khullar J.A.



**Concurring Memorandum of Judgment
of Justice Antonio**

[11] I agree with my colleagues on the outcome of the appeal, but disagree on the interpretation of section 33(4) of the *Securities Act*. In my view, the Commission correctly interpreted the provision in the context of the *Act* and was entitled to extend its interim order until the conclusion of any proceeding initiated pursuant to the *Act*.

Commission's Reasons

[12] The interim order was extended pursuant to section 33(4) of the *Securities Act*. In its entirety, section 33 provides:

33(1) Notwithstanding anything in this Act, where

(a) this Act

(i) permits the Commission or the Executive Director to make a decision after conducting a hearing or after giving a person or company an opportunity to have a hearing, or

(ii) creates an offence,

and

(b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest,

the Commission or the Executive Director may make an interim order at any time with or without conducting a hearing on notice to a person or company against whom the order is sought.

(2) If the Commission or the Executive Director makes an interim order under subsection (1) without conducting a hearing on notice to a person or company against whom the order is sought,

(a) unless the order otherwise provides, the order takes effect immediately on being made,

(b) the order expires 15 days from the day that it takes effect, and

(c) the Commission or the Executive Director, as the case may be, shall send to each person or company named in the interim order

(i) a copy of the interim order,

(ii) any evidence admitted in support of the interim order, and

(iii) an accompanying notice of hearing in respect of the extension of the interim order pursuant to subsection (4), if applicable.

(3) If the Commission or the Executive Director makes an interim order under subsection (1) after conducting a hearing on notice to a person or company against whom the order is made, the order takes effect immediately and remains in effect

(a) for the period of time specified in the order, or

(b) until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded.

(4) Before the expiry of an interim order, the Commission or the Executive Director, as the case may be, may extend an interim order for a specified period of time, or until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded, if

(a) the Commission or the Executive Director provides the person or company named in that order with an opportunity to be heard, and

(b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest.

[13] The Commission held the purpose of section 33 is to allow a panel to impose orders if Commission staff are able to provide *prima facie* proof the *Act* has been contravened and there is a significant risk that those subject to the order could cause prejudice to the public interest before a hearing is completed.

[14] Protective interim orders can be made at any time. The wording of section 33 does not restrict the duration of an interim order based on whether a proceeding has been commenced. A

proper interpretation of subsection 33(4) requires a harmonious reading with section 33(1)(b), which is the starting point for making interim orders. Although a proceeding had not been commenced, it was still appropriate for protective measures to be in place until any such proceeding were to be commenced and concluded. The Commission also noted that the appellant could have applied under section 214(1) to revoke or vary the interim order.

[15] The Commission found its interpretation was reinforced by the fact that section 33(4) sets out three preconditions to the extension of an interim order, and that those preconditions do not include a requirement that a hearing or trial has already been initiated.

[16] The Commission further held there was no improper delegation of power to Commission staff. Interim orders are not within staff control because pursuant to section 214, a Commission panel may revoke or vary any decisions including interim orders.

[17] The appellant submitted his interpretation was supported by the history of amendments to section 33. After a careful review of prior versions of the section, the Commission found no merit in this line of argument.

[18] The Commission concluded the extended interim order was valid and went on to find the appellant breached section 93 of the *Act* when he failed to comply with it.

Analysis

[19] The contentious portion of subsection 33(4) reads: “may extend an interim order for a specified period of time, or until any proceeding initiated pursuant to this *Act*, including a trial in respect of an offence, is finally determined or otherwise concluded”. Viewed narrowly, the issue is the interpretation of the word “initiated”. The appellant’s interpretation is that the word is to be read as the equivalent of “has been initiated”. The respondent’s interpretation is that the word is to be read as the equivalent of “may be initiated”. The words of the section alone will not resolve the issue.

[20] As the Supreme Court of Canada has recently and repeatedly stated, “statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute’s scheme and objects”: *Michel v Graydon*, 2020 SCC 24 at para 21.

[21] The appellant’s position that the provisions should be read as “has been initiated” is not supported by the purpose of the *Act* and would not be in harmony with related provisions.

[22] The *Act*’s main purpose is protective: it creates the Commission to protect investors and the public from misconduct: *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301 at 314; *EnCharis Community Housing and Service v Alberta Securities Commission*, 2019 ABCA 177 at para 30. This protective role, common to all securities commissions, must be recognized when assessing the way in which they perform their functions under their enabling legislation: *Brosseau* at 314.

[23] Other provisions of Act provide flexibility in ordering that certain conduct cease, even prior to initiation of proceedings. Subsection 33(1) empowers the Commission to issue interim orders to prevent the continuation of *prima facie* breaches “at any time” and “notwithstanding anything else” in the *Act*, when the Commission considers that the length of time required to conduct a hearing or a trial and render a decision could be prejudicial to the public interest. Before an interim order expires, the Commission, pursuant to subsection 33(4), may extend it until any proceeding initiated under the *Act* is finally determined or otherwise concluded.

[24] As the Commission noted, the legislature imposed certain preconditions to the extension of an interim order under section 33(4), but those preconditions do not include the prior commencement of a proceeding. The words “until any proceeding initiated ... is finally determined or otherwise concluded” define the point of expiry even in the absence of an extant proceeding before the Commission. Consistent with its protective role and the wording of the *Act*, the Commission has the power to make and to extend interim orders before the potential initiation of a proceeding.

[25] The appellant’s theoretical concerns that an interim order could be in place indefinitely do not arise here. The appellant appears to have been represented by counsel throughout these proceedings and could have taken steps at any time to have the interim order revoked under section 214(1) or appealed under section 38. The scheme of the *Act* establishes this court as the proper forum in which to contest an order that was allegedly issued in error. An individual is not entitled to ignore an order on the basis that he believes it to be void. Such behaviour would undermine the *Act’s* protective purpose and could expose individuals subject to the Commission’s orders to additional jeopardy.

[26] This observation supports my colleagues’ conclusion on collateral attack, with which I concur.

[27] In my view, the Commission did not err in interpreting section 33(4) of the *Securities Act* or in dismissing the nullity application. For this reason, and because the nullity argument was a collateral attack on the interim order, I agree the appeal should be dismissed.

Appeal heard on March 11, 2022

Memorandum filed at Calgary, Alberta
this 23rd day of March 2022.



A handwritten signature in blue ink, appearing to be "Antonio J.A.", written over a horizontal line. The signature is stylized and extends to the right of the line.

Antonio J.A.

Appearances:

C. Pillar

P.A. Verschoote

for the Respondent

B.M. Miller

for the Appellant